

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

RICHARD ALLEN NUNEZ, III #18864

PETITIONER

VERSUS

CIVIL NO. 1:15-CV-174-HSO-JCG

**PEARL RIVER COUNTY COURT,
STATE OF MISSISSIPPI, AND
DAVID ALLISON, SHERIFF**

RESPONDENTS

**ORDER OVERRULING PETITIONER'S OBJECTION [17],
ADOPTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION [16], GRANTING RESPONDENT DAVID
ALLISON'S MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM [12], AND DISMISSING WITHOUT PREJUDICE
RICHARD ALLEN NUNEZ'S PETITION [9] FOR WRIT OF
HABEAS CORPUS UNDER 28 U.S.C. § 2241**

This matter is before the Court for consideration of Petitioner Richard Allen Nunez's Objection [17] to United States Magistrate Judge John C. Gargiulo's November 18, 2015, Report and Recommendation [16] recommending that Respondent David Allison's Motion to Dismiss [12] be granted and that Richard Allen Nunez's Petition [9] for Writ of Habeas Corpus Under 28 U.S.C. § 2241 be dismissed without prejudice. After due consideration of the Objection [17], the Report and Recommendation [16], the Motion [12], all related pleadings, the record, and relevant legal authorities, the Court finds that Petitioner's Objection [17] should be overruled, that Magistrate Judge Gargiulo's Report and Recommendation [16] should be adopted as the finding of this Court, that Respondent David Allison's Motion [12] should be granted, and that Petitioner Richard Allen Nunez's Petition [9] for Writ of Habeas Corpus Under 28 U.S.C. § 2241 should be dismissed without

prejudice.

I. BACKGROUND

On February 26, 2015, Petitioner Richard Allen Nunez, acting pro se, filed a Complaint asserting claims under 42 U.S.C. §1983 against Defendants Pearl River County Court and the State of Mississippi. The Complaint was docketed in Civil Action No. 1:15cv57-KS-RHW. In his request for relief, Petitioner stated that he sought a “habeas corpus filed in this matter.” Compl. [1] at 5. On June 4, 2015, United States Magistrate Judge Robert H. Walker entered an Order Severing Habeas Claims and directed the Clerk of Court to open a new 28 U.S.C. § 2241 civil action on the habeas claims. Order [6] at 1-2.

On June 4, 2015, the Clerk of Court opened this case as Civil Action No. 1:15cv174-HSO-JCG and filed Judge Walker’s Order. Order [1]. On July 23, Richard Allen Nunez, acting pro se, filed his Petition For a Writ of Habeas Corpus Under 28 U.S.C. § 2241 [9] naming as Respondents Pearl River County Court and the State of Mississippi. On July 28, 2015, United States Magistrate Judge John C. Gargiulo entered a text only Order To Answer, dismissing Pearl River County Court and the State of Mississippi, substituting Sheriff David Allison as Respondent, and ordering Jim Hood, Attorney General for the State of Mississippi, to answer or otherwise respond to the Petition [9] on behalf of Sheriff Allison.

On August 20, 2015, Respondent Sheriff David Allison filed a Motion to Dismiss for Failure to State a Claim [12]. On September 9, 2015, Magistrate Judge

Gargiulo enter an Order to Show Cause [13] directing Petitioner to respond or show cause why Respondent's Motion to Dismiss [12] should not be granted. On September 22, 2015, Petitioner filed his Response [15].

On November 18, 2015, Magistrate Judge Gargiulo entered his Report and Recommendation [16] recommending that Respondent's Motion to Dismiss [12] be granted and that Richard Allen Nunez's Petition [9] for Writ of Habeas Corpus Under 28 U.S.C. § 2241 be dismissed. Petitioner Richard Allen Nunez filed an Objection [17] on November 25, 2015. On November 30, 2015. Respondent David Allison filed a Notice [18] that he agreed with the "well-reasoned findings of fact and conclusions of law made by the Magistrate Judge in his Report and Recommendation."

II. DISCUSSION

Generally, when a Petitioner objects to a Magistrate's Report and Recommendation, this Court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see also Longmire v. Guste*, 921 F.2d 620, 623 (5th Cir. 1991) (noting parties are "entitled to a de novo review by an Article III Judge as to those issues to which an objection is made"). However, this Court need not consider objections which are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987). This Court is not required to make new findings of fact independent of those

made by a magistrate. *Warren v. Miles*, 230 F.3d 688, 694-95 (5th Cir. 2000). Nor is this Court required to reiterate the findings and conclusions of a magistrate judge. *Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993).

In the present case, the Court finds that Plaintiff's Objection [17] is frivolous, conclusive and general, in that the Objection does not dispute the Magistrate's findings and conclusions and simply reasserts Petitioner's allegations that he has affirmative defenses to the underlying state court criminal case for which he is awaiting trial. Plaintiff's Objection should be overruled.

Having conducted the required review, the Court finds that the Magistrate Judge's Report and Recommendation thoroughly considered all issues, and is neither clearly erroneous, nor contrary to law. Because habeas corpus is not an available remedy to the claims asserted by Nunez in his Petition, Respondent David Allison's Motion to Dismiss should be granted and Richard Allen Nunez's Petition [9] for Writ of Habeas Corpus Under 28 U.S.C. § 2241 should be dismissed. The Court finds that the Report and Recommendation should be adopted as the finding of this Court.

III. CONCLUSION

For the reasons set forth herein, Petitioner Richard Allen Nunez's Objection [17] will be overruled, United States Magistrate Judge John C. Gargiulo's Report and Recommendation [16] will be adopted as the finding of this Court, Respondent David Allison's Motion to Dismiss for Failure to State a Claim [12] will be granted,

and Richard Allen Nunez's Petition [9] for Writ of Habeas Corpus Under 28 U.S.C. § 2241 will be dismissed without prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Petitioner Richard Allen Nunez's Objection [17] to United States Magistrate Judge John C. Gargiulo's Report and Recommendation [16] is **OVERRULED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that Magistrate Judge Gargiulo's Report and Recommendation [16] is adopted as the finding of this Court, that Respondent David Allison's Motion to Dismiss for Failure to State a Claim [12] is **GRANTED**, and that Richard Allen Nunez's Petition [9] for Writ of Habeas Corpus Under 28 U.S.C. § 2241 is **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED AND ADJUDGED, this the day of 21st January, 2016.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE